

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 44 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR
Chokadi

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

SARLABEN PRABHULAL

Versus

HEIRS OF ZAVERCHAND K VORA

Appearance:

MR KJ KAKKAD for Petitioner
Mr. A.G.Vyas for respondents

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 13/03/2000

ORAL JUDGEMENT

#. The present petition has been filed by the original plaintiff of Rent Suit No.. 1060 of 1979 (Old Suit No. 528 of 1975). The plaintiff had filed the aforesaid suit on the ground that she is the owner of the suit premises situated at Diwanpaa Street No.5, in the city of Rajkot.

Originally the suit premises belonged to one Prabhulal Vechhraj. The plaintiff and the defendant nos 4 to 8 are the heirs of Prabhulal Vechhraj. Deceased Zaverchand Karamchand had taken two rooms, kitchen and Osari by way of lease from Prabhulal Vechhraj at a monthly rent of Rs. 15.60 p. Defendants nos 1 and 2 are the sons of deceased Zaverchand and defendant no.3 is the widow of said deceased Zaverchand. It is the case of the plaintiff that there is a Fali in the suit property. That there are two kundies therein out of which one is small and same is used by the defendants nos 1 to 3. That the plaintiff and defendants nos 4 to 8 are in sole possession of this Fali. It is averred by the plaintiff that there is a Deli which is the passage to go to the property and that in that Deli there is a Kundi and Chokadi. That in the Chokadi there is a water tap. That the plaintiff and defendants nos 4 to 8 alone have a right to use this Chokadi and Kundi. That abutting this Chokadi, there is an Osari of the rented premises and in the said Osari, there is a Jali door. Aforesaid door is abutting the Kundi and Chokadi. According to the plaintiff the defendants nos 1 to 3 have no right to open this door and it is to be kept closed permanently. According to the plaintiff the passage to the defendants nos 1 to 3 to the rented premises is from the Osla which is in the Fali and ultimately from the same, they can reach to the rented premises. It is the further case of the plaintiff that defendants nos 1 to 3 have no right to use the Chokadi and Kundi which is in the Deli. That the defendants nos 1 to 3 have attempted to open this door which is on the side of Chokadi and Kundi and have tried to obstruct the plaintiff in the use of the Kundi and Chokadi and therefore, the said suit was filed for injunction restraining the defendants nos 1 to 3 from using the Meda and also from opening the Jali door which is abutting the Kundi and Chokadi.

#. Defendants nos 1 to 3 resisted the suit by filing written statement at exh.. 11. They denied the suit of the plaintiff on various grounds. According to them they are also entitled to the bath room kitchen and Osari and they are also entitled to use the bath room and lavatory in common with the plaintiff and they are also entitled to use the Meda which is in the Deli. According to the defendants nos 1 to 3 they are in exclusive possession of the Fali land and that they have got a right to use the Chokadi and Kundi which is in the Osari in common with the plaintiff. It is also their case that they are entitled to open the door which is on the side of the Chokadi and kundi and they denied that it is to be kept closed permanently. On the aforesaid grounds, the suit

of the plaintiff was resisted by the defendants nos 1 to 3

#. The Trial Court framed various issues at exh.21. The Trial Court came to the conclusion that over and above the suit premises, the defendants nos 1 to 3 have got a right to use the Chokadi and also passage through Fali land for going to their rented premises. The Trial Court negatived the plaintiff's case that the water tap in the Chokadi in the Deli is to be used by her and defendants nos 4 to 8 only. The Trial Court further held that the plaintiff is in exclusive possession of the Meda which is in the Deli of the suit property. The Trial Court ultimately held that the plaintiff is entitled to injunction so far as Meda is concerned and not for the door which opens and abuts on the side of the Chokadi and kundi. Accordingly the suit was partly allowed. The plaintiff being aggrieved by the part of the decree against her, preferred an appeal being Civil Appeal No.239 of 1980 in the Court of the learned District Judge, Rajkot. Said appeal was heard by the learned Extra Assistant Judge, Rajkot who his his judgment and order dated 11.11.82 dismissed the same with costs. The petitioner plaintiff has therefore, filed the present Civil Revision Application against the aforesaid order of the Appellate Court.

#. I have gone through the judgments of the courts below as well as the evidence on record. Considering the report of the local inspection as well as the evidence of the plaintiff, it is clear that the suit property has got a deli whose door is facing east and falling in the main road of Diwanpara Street no.5. On the right side of this deli there is a latrine and adjoining to it there is a bath room. Above this latrine and bath room and the deli passage there is a dela (floor) and adjoining to the bath room there is a chokdi with water tap and adjoining to this Chokadi there is a kundi. Behind this water tap which is in the Chokadi there is the Jali door which opens inside the osari. This osari forms part of the premises which has been let to the defendants nos 1 to 3. The rented premises consists of two rooms, kitchen and Osari. This Jali door is the disputed door which is adjoining to the Chokadi and Kundi. The Appellate Court has considered the situation of the property as well as also considered the oral evidence of the plaintiff as well as of the defendants. The Appellate Court came to the conclusion that the Chokadi and kundi in question can be used only by the person who reside in the suit property. It has been found that the notice at exh.80 also refers to the manner in which the defendant-tenants

are using the rented premises and the Deli. In that notice there was no dispute raised about the user of the door which abuts on the Chokadi and kundi in the Fali. The Appellate Court therefore, has considered the notice correspondence which are at exhs. 76 and 80. It was found that non mention of the use or the Chokadi and kundi would not mean that the defendants tenants are not entitled to use the same and that it was found as a matter of fact that the defendants-tenants were using the same. Before the Appellate Court the matter was argued more or less on the question of user of the Jali door which abuts on the Chokadi and kundi which is in the Fali and which abuts the osari which forms part of the demised premises of the defendant-tenant. The Appellate Court has considered this aspect in para 8 of its judgment. It is found that so far as the use of disputed Jali door is concerned the plaintiff has come with a clear case that as per the terms and conditions of the tenancy this Jali door is to be kept closed by the defendant-tenant. Same was of course denied by the tenants. According to the plaintiff when the suit premises were let to deceased Zaverchand i.e. father of the defendants nos 1 and 2 and husband of defendant no.3 by her father i.e. deceased Prabhulal she was present at that time though of course she was aged about 5 to 6 years at that time and according to her as per the said talk it was specifically agreed that the disputed Jali door was to be kept closed permanently. Aforesaid plea was rightly disbelieved by the Appellate Court. Similarly as per the panchnama at exh. 8/1 the Jali door was found to be opened from inside into the osari which is in possession of the defendants-tenants. However, it was found that at the time of panchnama it was locked from inside with an old lock. On that basis it was argued that the tenant had no right to open it because it opens on the Chokadi which is adjoining to it. However the Appellate Court has found that if the door is locked from inside then it would bear the lock of the defendants-tenant and not that of the plaintiff. The plaintiff's evidence was therefore minutely considered by the Appellate Court. However, from the evidence it was found that the Chokadi in question which is abutting the disputed Jali is the only Chokadi which is used for the purpose of washing clothes and except the said Chokadi, there is no other Chokadi . In the said Chokadi there is water tap . Considering the totality of the evidence as a whole the Appellate Court came to the conclusion that the defendants-tenants have got equal right to use the aforesaid Chokadi and kundi which is abutting to the Jali door. Accordingly it was found that the defendants were entitled to use the same and have right to use the aforesaid Jali door. Aforesaid

finding is purely based on the appreciation of evidence by both the courts below and therefore, the Appellate Court on appreciation of evidence has reached a conclusion on facts. In that view of the matter this court in revision application cannot reappraise the evidence and take a different view on facts. Even otherwise the courts below have appreciated the evidence on record and have reached to a correct conclusion. I therefore, do not find any substance in this revision application and therefore, the same deserves to be dismissed. Accordingly the Revision Application is dismissed. Rule is discharged. Interim relief granted earlier stands vacated. No order as to costs.

Further order

(27.3.2000)

#. After the aforesaid judgment was dictated but before it could be signed, a Civil Application was filed by the learned advocate for the petitioner making a prayer that he may be allowed to address the court on some additional points as he was not present when the main CRA was decided.

#. Mr. A.G.Vyas learned advocate for the respondent has stated that he no objection if the learned advocate for the petitioner is permitted to argue some additional points on the merits of the main CRA especially when the judgment is not signed. In view of the consent of both the sides, Mr. Kakkad the learned advocate for the petitioner is permitted to submit additional points on merits of the main CRA.

#. Mr. Kakkad has argued that the finding of the courts below are perverse as the courts below have committed grave error in deciding the rights of the defendants to use the Chokadi dehors the prayer of the plaintiff in the suit itself and therefore whatever may be the evidence on record should be ignored on that point as it is dehors the pleading. I do not find any substance in the the said argument; firstly because it is the prayer of the plaintiff that the door in question should not be allowed to be opened and that the plaintiff should be restrained from opening the door having a Jali. In connection with the said prayer it was the case of the defendants in the written statement that without opening the door in question he cannot go to the Chokadi and use the same. Therefore, in order to determine the controversy and in order to see whether any such prayer for injunction can be made by the plaintiff or not it was necessary to consider whether the defendants have right to use the

Chokadi or not. Looking to the controversy in question aforesaid question was examined by the court and therefore, issue was framed by the Trial Court. It seems that no objection was taken by the plaintiff for framing such issue and the parties adduced evidence in detail on the aforesaid issue. On the basis of the said evidence the Court has given finding on merits about the prayer for injunction so far as the door in question is concerned. It is not the case of the plaintiff that the plaintiff could not lead evidence on the aforesaid issue as there was no prayer on the part of the plaintiff in the suit regarding the use of the Chokadi. Therefore, when the parties have led evidence in details and the same was appreciated by the two courts below, it cannot be said that any error is committed by the courts below. I therefore, do not find any substance in the submission of Mr. Kakkad. It was next argued that there is already a lock which is applied from inside and therefore, it would be presumed that the defendants have no right to open the said door. According to Mr.Kakkad if the key of the door was with the defendants then there should be some evidence. But the key of the same was with the plaintiff. The appellate court on page 11 of its judgment has given detailed finding on the aforesaid fact and the story of the plaintiffs regarding key is not believed. In fact the defendants are using the back portion of this closed door. This court while sitting in revision cannot reappreciate the evidence treating this revision application as a regular appeal. I therefore, do not find any merit in the aforesaid argument of Mr. Kakkad. It was further argued that even if the door in question is allowed to be open, then also it will not be possible for the defendants to use the Chokadi in question because there is some height between the door and the Chokadi in question and therefore, according to him, unless the defendant jump from the open door, he cannot reach upto the Chokadi in question. No such point is argued before the courts below. Ultimately, it is for the defendant as to how he should use or reach upto the Chokadi. It is therefore, not possible to believe that looking to the situation, the defendant cannot use the Chokadi in question. All this is within the realm of appreciation of evidence and the point which is not argued before the Appellate Court cannot be taken note of in this Revision Application. So far as the appreciation of evidence is concerned, first Appellate Court is the final court for appreciation of evidence. It was next argued by Mr. Kakkad that at the time of admitting this CRA, interim relief is given in his favour and therefore, the defendant is not using the aforesaid Chokadi. According to him therefore, since the defendant is not

making use of this Chokadi for so many years, the Revision Application should be allowed on that ground. I do not find any substance in this argument. If the matter is not heard earlier, no blame can be attributed to the respondents herein and no party can suffer because of the pendency of the proceedings in the court. Such arguments can never be canvassed by the party who has obtained interim relief from the court and thereafter trying to put the case that because of interim relief granted by this court, the matter must be allowed.

#. It was lastly argued by Mr. Kakkad that present CRA was ordered to be heard with another CRA being CRA No.1906 of 1984. Aforesaid CRA is not placed with the present CRA and present CRA was already disposed of by a speaking order and only some additional points are permitted to be argued. So far as CRA No.1906 of 1984 is concerned, that may be placed for hearing separately as now it is not necessary to hear that Revision Application with the present Revision Application.

#. Mr. Kakkad has prayed for some time on the ground that he wants to approach the Supreme Court. The interim relief granted by this court at the time of admission of this CRA is continued upto 15.6.2000.

(P.B.Majmudar.J)

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